No. 13,061

IN THE

United States Court of Appeals

For the Ninth Circuit

EDMUND E. SUNDWALL,
Libelant-Appellant,

vs.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued Herein as Pacific Far East Steamship Company,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

BELLI, ASHE & PINNEY,
240 Stockton Street, San Francisco 8, California,
Proctors for Libelant-Appellant.

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I. JURISDICTIONAL STATEMENT.

This is an appeal in Admiralty from a final decree of dismissal in favor of appellee, Pacific Far East Line, Inc., in the United States District Court for the Northern District of California, Southern Division, in an action for personal injuries sustained by a seaman aboard the Iran Victory.

The pleadings in the District Court were a Libel in Personam (Apostles on Appeal 3), and answer of

Pacific Far East Line, Inc. (A. 7). The Court made its order dismissing the libel on April 9, 1951.

The jurisdiction of the United States District Court over actions, civil and maritime, involving claims for damages arises from Article III, Sections 1 and 2, of the United States Constitution, wherein it is provided that the judicial power of the United States shall be vested in the Supreme Court and such inferior Courts as Congress may establish, and such power shall extend to all civil causes of Admiralty and maritime jurisdiction. Jurisdiction of the particular cause is authorized by the Merchant Marine Act of June 5, 1920 (Jones Act), 46 U.S.C. 688.

The jurisdiction of this Court is founded upon 28 U.S.C. 1291, by reason of a notice of appeal filed July 6, 1951, from a decree in favor of appellee herein on April 9, 1951.

Questions.

Appellant, a seaman aboard appellee's vessel, Iran Victory, sustained injury to his eye when oil being transferred from a large drum to a pail by appellant and by other seaman splashed in his eye. The evidence in the case was that it was customary to transfer oil from a drum to a smaller container by the use of a hand pump; that in this instance a hand pump had been requested by appellant but was not forthcoming and upon orders of his superior, he proceeded, in company with his two fellow seamen, to transfer the oil by pouring. The questions presented for appeal then are:

1. Was the ship rendered unseaworthy by the failure to provide a pump to transfer the oil?

2. Was appellee negligent in ordering the work done in the manner in which it was done?

II. STATEMENT OF THE CASE.

Appellant is a seaman, who was 57 years of age at the time of the trial. He had been going to sea continuously since 1911 (A. 30). He went aboard the Iran Victory, a vessel owned by appellee, on April 8, 1949. At that time he presumed he took and passed the customary physical examination (A. 32). He could see out of his left eye in a satisfactory manner at that time (A. 33). On April 28, 1949, he got oil splashed in his eye aboard the Iran Victory. At that time, a seaman named Bowles and another seaman, whose name appellant does not recall, were working with him (A. 34). They were directed by the boatswain to transfer oil from a 54-gallon drum to a 5-gallon bucket (A. 35). The drum was full (A. 39). Appellant testified (A. 36-38):

> "A. No; we got the order to release the lashing so I looked—like that we should have a pump; we don't need to take the lashing off the barrel, the barrel can be lashed all the time, just use the pump. They don't had no pump, so we took the lashing off and I held onto the bucket.
>
> Q. Did you ask anybody for a pump?
>
> A. Yes, sir.
>
> Q. Who did you ask for a pump?

A. I asked the boatswain for a pump and he made the statement they don't have no pump on the ship.

Q. You have been going to sea ever since 1911, have you?

A. Yes, sir.

Q. Do you know what the custom is relating to removing oil from a fifty-four-gallon barrel on board ship?

A. The way I always done it and always seed it done, either to have a pump or else with a barrel high enough where you can get a bucket underneath and have a spigot.

Q. I believe you said you asked somebody for a pump?

A. Yes, sir.

Q. And you were told that there wasn't any pump, is that correct?

A. That is correct, sir.

Q. After the boatswain told you that there wasn't any pump did he tell you how to go about getting the oil out of the barrel?

A. That was the only way, I suppose, to take the top and the air top out there and the cap off and release the lashing and then pour out that way.

Q. Was there any spigot provided for you to use in getting the oil out of the barrel?

A. No, sir, they just told us to go ahead the way it was, release the lashing on the barrel and pour it in a bucket that way.

Q. Somebody told you to do it that way?

A. The boatswain told us to take the lashing off and get the five gallons of paint or oil out of there.

Q. Have you ever worked upon any ship where they didn't provide you with either a pump or a spigot?

A. No, sir.

Q. To take oil out of a barrel?

A. No, sir.

Q. Never in the years you have been to sea?

A. No, sir.

Q. How did you get the oil out of the barrel on this occasion?

A. Well, we took the cap off; the two fellows knocked the cap off or turned it so it could turn around, and pulled the barrel over, and I held the bucket.

Q. Who pulled the barrel over?

A. Them other two men, Bowles and——

Q. What did you do?

A. I held the bucket, sir.

Q. With you holding the bucket and the other two men pulling on the barrel will you tell us what happened?

A. Well, when we had about three—maybe three and a half feet of oil in that bucket, then all of a sudden, if they released the air hold or if the ship rolled, I can't tell you anything, that that oil splashed up and came in my face.

Q. You don't know what happened that made the oil come in your face, is that correct?

A. No, because I were watching the bucket so I don't get anything on the deck.

Q. How much oil came up in your face, do you know?

A. Oh, quite a lot.

Q. Did it cover your face?

A. Well, pretty well, good on one side, the way I was standing, the left side against the barrel.

Q. Did any of the oil get in your eye?

A. Positively.

Q. What eye?

A. My left eye."

After washing his face, appellant noticed that his eye started to burn and washed it out with an eye cup (A. 39).

Walter E. Brunsch, called as a witness for appellee, and who was the mate aboard the Iran Victory at the time of the injury, testified that one small hand pump belonging to the engineers, was kept aboard the Iran Victory; that it was used for transferring diesel oil and coal oil (A. 113); that in his experience the deck department sometimes borrowed the hand pump from the engineers (A. 114); that the deck department would use it to transfer coal oil or paint thinner; that paint thinner and kerosene comes aboard ship in fifty gallon drums (A. 114, 115).

Dr. Constantine R. Bricca, Jr., called as a witness for appellant, testified that he found a scarred area on the cornea of the left eye (A. 69); that in addition, there was corneal vascularity which resulted in the cornea becoming opaque (A. 70); that while 20/20 would be normal vision, Sundwall's vision was approximately 1/200 (A. 71); that the reason for this diminution in vision was the opaqueness of the cornea (A. 72); that the opacity and the scar was caused by a chemical burning (A. 78, 79).

Dr. Samuel F. Boyle, called as a witness for appellee, testified that when he examined Sundwall in December, 1949, he had vision in the left eye of 20/200 (A. 127); that it would not be unreasonable to assume that the scar on the cornea, which he observed, was caused by the injury of April, 1949 (A. 129); that the scarring he found could have been caused by an irritation of the eye induced by something splashing in it (A. 134); that Sundwall would be incapable of performing the ordinary duties of a seaman (A. 137); that while there was a history of eye injury prior to November, 1948, there must have been some scarring since that date to produce the diminution of vision which the doctor found in 1949 (A. 143).

III. SPECIFICATIONS OF ERROR.

A. The Honorable District Court erred in disregarding the testimony of libelant as to what equipment is customary aboard a ship to make it seaworthy (A. 148).

B. The Honorable District Court erred in disregarding the testimony of libelant that the boatswain was negligent in ordering work done in the manner in which it was done, that the work was negligently done, and in failing to provide the necessary equipment (A. 148, 149).

C. The Honorable District Court erred in dismissing libelant's libel herein (A. 149).

IV. ARGUMENT.

The law is well settled that the owner of a vessel is liable for his failure to furnish adequate appliances. *The Osceola,* 189 U.S. 158; *Carlisle Packing Co. v. Sandanger,* 259 U.S. 259; *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 428.

Where the method provided for doing work aboard ship is not adequate, the vessel is thereby rendered unseaworthy. As the Court said in *Mahnich v. Southern Steamship Co.,* 321 U.S. 96, 103:

> "The staging from which petitioner fell was an appliance appurtenant to the ship. *It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used* * * * *its inadequacy rendered it unseaworthy* * * * (Emphasis added.)
>
> "Nor does the fact that there was a sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one. We have often had occasion to emphasize the conditions of the seaman's employment, see Socony-Vacuum Oil Co. v. Smith, supra (305 U.S. 430, 431, 83 L. Ed. 269, 270, 59 S. Ct. 262) and cases cited which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the vessel or the owner must

> provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done. For, as was said in the Osceola, supra (189 U.S. 175, 47 L. Ed. 764, 23 S. Ct. 483), the owner's obligation is 'to supply and *keep in order* the proper appliances appurtenant to the ship.' (Italics supplied.)"

It is obviously dangerous to pour oil from a full fifty gallon drum into a five gallon bucket. The motion of the ship, the weight of the drum, the human element make it highly probable that splashing will result. This danger was apparent to appellant. He asked for a hand pump, one which was available, according to the testimony of the mate and which had been borrowed in the past for transferring liquids. The use of the hand pump was the customary mode of doing the work in question. He was denied the use of the pump. The injury resulted. The situation is analogous to that in *Armit v. Loveland,* 115 Fed. (2d) 308. There, the injured seaman, noticing an absence of splash plates about the engine, asked the superintendent in charge of the upkeep of the boats for splash plates or materials which he could use to make them. This he was denied. A large amount of oil had splashed about the engine room and in going about his duties, the seaman slipped upon the oil and sustained injuries. The use of splash plates would have prevented the splashing of the oil. The Court said, at page 311:

> "The plaintiff's request for needed splash plates or material with which to make them was arbitrarily denied. As a direct consequence, the plaintiff, a seaman, had no alternative in the discharge of his duty but to put to sea without the splash plates on the engine or the correction otherwise of the condition which their absence necessarily and obviously produced. He was bound to use the equipment and appliances which his employers furnished. Storgard v. France and Canada S.S. Corp., supra."

The fact that appellant knew the danger of the course he pursued, does not defeat his right of recovery. As the Court said in *Grimberg v. Admiral Oriental S.S. Line,* 300 Fed. 619, 621:

> "The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. Cricket S.S. Co. v. Parry (C.C.A.) 263 Fed. 523, at 525 and 526, certiorari denied Cricket Steamship Co. v. Parry, 252 U.S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726."

V. CONCLUSION.

Clearly, the injuries sustained by Sundwall resulted from the oil splashing in his eye. The oil splashed in his eye because of the method by which the boatswain directed the work to be done. The failure to supply a hand pump upon request rendered the work unsafe and the vessel thereby unseaworthy.

For the foregoing reasons, it is respectfully submitted that a reversal should be had in this case.

Dated, San Francisco, California,
November 26, 1951.

BELLI, ASHE & PINNEY,
Proctors for Libelant-Appellant.